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FEDERAL COMMUNICATIONS COMMISSION
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January 22, 2004

Marlene H Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: ***WC Docket No. 02-359***

Dear Ms Dortch.

Enclosed for filing is the original and four copies of Verizon's Opposition to Cavalier's Petition for Reconsideration in the above referenced docket In addition, we are enclosing eight copies for the arbitrator Thank you.

Sincerely,

Kimberly A Newman
of O'Melveny & Myers LLP

cc Stephen T Perkins
Martin W Clift, Jr
Richard U Stubbs
Ms Terri Natoli
Mr Jeremy Miller
Mr Brad Koerner
Mr Marcus Maher
Mr Richard Lerner
Mr John Adams
Ms Margaret Dailey
Ms Deena Shetler

0+11

Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C 20554

In the Matter of	)	
	)	
Petition of Cavalier Telephone, LLC	)	
Pursuant to Section 252(e)(5) of the	)	WC Docket No. 02-359
Communications Act for Preemption	)	
of the Jurisdiction of the Virginia State	)	
Corporation Commission Regarding	)	
Interconnection Disputes with Verizon	)	
Virginia, Inc and for Arbitration	)	

VERIZON VIRGINIA INC.'S OPPOSITION TO CAVALIER TELEPHONE LLC'S PETITION FOR RECONSIDERATION

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January 22, 2004

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I. INTRODUCTION

Pursuant to 47 C F R. Section 1 106, Verizon Virginia Inc. ("Verizon") respectfully submits this Opposition to the Petition for Reconsideration of Cavalier Telephone LLC ("*Cavalier PFR*") filed on January 12, 2004

II. THE BUREAU CORRECTLY INTERPRETED THE EVIDENCE AND PROPERLY CONCLUDED THAT CAVALIER IS NOT ENTITLED TO MORE FAVORABLE TREATMENT THAN VERIZON'S OWN RETAIL CUSTOMERS (ISSUE C9)

In its arbitration petition, Cavalier asked the Bureau to prohibit Verizon from occasionally providing Cavalier a 2-wire HDSL DS-1 loop with a 4-wire interface when Cavalier orders a DS-1 loop The Bureau rejected Cavalier's language because it "would impose obligations beyond what is required by the Act or Commission rules." *Order* ¶ 98. It concluded that Verizon need not install electronics to provide Cavalier end-to-end 4-wire DS-1 loops in all instances, because Verizon had demonstrated that it does not do so for its own retail customers *Id* To clarify that Verizon must maintain like treatment of Cavalier and Verizon's retail customers, the Bureau added contract language stating that "Verizon will not install new electronics unless Verizon routinely does so to serve its own customers " *Order* ¶¶ 98-99

Cavalier asks the Bureau to reconsider its ruling because it claims the evidence shows that Verizon does, in fact, perform the necessary network modifications to provide 4-wire DS-1 loops in all cases where Verizon's retail customer requests a 4-wire DS-1 loop To support this claim, Cavalier points to a single statement in its witness Webb's testimony. "Cavalier wants to be able to order 4-wire DS-1 compatible loops. Verizon will not honor such orders from Cavalier, even though it will honor such orders from its customers." *Cavalier PFR* at 5, *citing Webb Rebuttal* at 1-2 (emphasis deleted).

Contrary to Cavalier's claims, the Bureau has not misunderstood the record, and nothing justifies reconsideration of its ruling on Issue C9 The Bureau correctly concluded that Verizon's provisioning practices for DS1 loops were nondiscriminatory as between Verizon's wholesale and retail customers

In this regard, Verizon witness Clayton testified that, when either a wholesale or a retail customer asks for a four-wire DS-1 loop, Verizon will always supply a "four-wire transmission channel" *See Hearing Tr* at 430, 431, 432 (Clayton). In some cases, "the deployed network configuration and technology does not allow for the provisioning of an end-to-end 4-Wire DS-1 loop without the addition of new electronics" *Order* ¶ 97, *citing Hearing Tr* at 433 In these cases, Verizon's witness explained that Verizon substitutes a two-wire HDSL DS-1 loop with four-wire interfaces, regardless of whether the requesting party is a wholesale or retail customer *Hearing Tr* at 434

Ms Webb's vague, conclusory, unsupported implication to the contrary -- that Verizon "will honor [4-wire DS-1 loop] orders from its customers" -- certainly does not justify reversing the Bureau's conclusion that Verizon extends like treatment to its retail and wholesale customers. Nothing in Ms. Webb's testimony rebuts the specific showings that Verizon's witness made at the hearing To the extent there was competing testimony from the parties on this point, the Bureau was entitled to give greater weight and credence to Verizon's testimony -- particularly because it became apparent at the hearing that witness Webb was not even familiar with her testimony *See, e g , Hearing Tr* at 609-611 (because of Ms Webb's unfamiliarity with Exhibit AW-1 to her testimony, Staff directed its questions about the document to a different Cavalier witness)

Cavalier's claim that the Bureau "misapplied" the relevant legal standard to the evidence is just another tack to secure more favorable treatment than the law requires *See Cavalier PFR* at 4 As noted, the Bureau inserted additional language into section 11.2.9 of the contract to make clear that Verizon must provide comparable treatment to Cavalier and Verizon's retail customers If Verizon begins to "routinely install[] new electronics" in provisioning 4-wire DS-1 loops to its retail customers, then the Bureau "would expect Verizon to do so for Cavalier, as well" *Order* n 329 Although Cavalier claims that it is not taking issue with the wholesale-retail comparability standard underlying the Bureau's decision and embodied in the approved contract language (*Cavalier PFR* at 4), that is just what it is doing Cavalier objects to the language the Bureau approved, presumably because Cavalier wants its own, proposed language that would require Verizon to provide a 4-wire DS-1 loop anytime Cavalier asks for it, regardless of what network modifications Verizon would have to make to do so, and regardless of whether Verizon routinely makes these modifications to serve its own customers

The Bureau correctly evaluated the evidence and properly rejected Cavalier's language seeking to impose upon Verizon obligations beyond those required by the Act or Commission rules The Bureau should thus deny Cavalier's request to reconsider the ruling on Issue C9.

III. THE BUREAU SHOULD REJECT CAVALIER'S BELATED ARGUMENT THAT IT IS ENTITLED TO RECEIVE ASSURANCE OF PAYMENT FROM VERIZON (ISSUE C21)

Cavalier's "request for reconsideration" of the Bureau's ruling on Issue C21 is not a request for reconsideration at all As Cavalier itself admits, it is not asking the Bureau to reconsider its resolution of Issue C21, approving a contract provision allowing Verizon to seek certain assurance of payment protections from Cavalier *See Cavalier* PFR at 5. Rather, Cavalier is seeking to introduce a completely new arbitration issue – whether Cavalier should

have the contractual right to demand assurances of payment from Verizon. The Bureau should reject Cavalier's attempt to raise a new issue at this post-hearing and post-decision stage because it violates the Act, the procedural order in this case, and Verizon's due process rights.

Section 252(b)(2)(A) of the Act requires the petitioner to set forth all "unresolved issues" and "the position of each of the parties with respect to those issues." The Bureau's *Procedural Order* governing this case also required Cavalier to propose contract language reflecting its position on each unresolved issue [1] At the hearing, staff again directed the parties to submit their "last best [contract] offer language" by October 29, 2003 *See Hearing Tr* at 653 The staff made it clear that it wanted "all the proposed language . by both parties," and that "if it's not in there, it won't be decided." *Id* at 657, 661.

Thus, if Cavalier wished to litigate the issue of whether it could demand assurances of payment from Verizon, it had to raise that issue at the beginning of the proceeding and propose associated contract language Cavalier did not do so Nor did Cavalier include the proposal in its "last best offer." Neither Cavalier's petition nor any version of its proposed contract language raised the issue of whether the assurance of payment provision should be mutual. The only assurance of payment issue Cavalier identified in its petition was whether *Verizon* should have the right to demand deposits and prepayments from Cavalier. *See Cavalier's Petition*, Exhibit A at 4

There is no reason Cavalier could not have raised the mutuality issue at the beginning of this arbitration, and Cavalier offers no explanation for its failure to do so Cavalier was clearly on notice that any assurance of payment provision the Bureau adopted would run only to Verizon, because that was the nature of the issue Cavalier itself identified.

[1] *See* Procedures Established for Arbitration of an Interconnection Agreement Between Verizon and Cavalier (WC Docket No 02-359), DA 03-2733 (August 25, 2003) at 6 ("The DPL shall set forth, as to each unresolved issue Each party's proposed contract language ")

Aside from violating the Act and the Bureau's procedural order, consideration of Cavalier's new issue at this final stage of the case would disregard Verizon's procedural due process rights. There was no hearing on the issue of whether Cavalier should be able to demand assurances of payment from Verizon, and no discussion about the specific terms and conditions that might reflect such a right In short, Verizon was denied any opportunity to test the basis for Cavalier's position on its new assurance of payment issue, through cross-examination, discovery, or otherwise

Safeguarding this opportunity is essential here, because Cavalier makes factual claims to support its position that the Bureau should adopt assurance of payment protections for Cavalier Cavalier argues that it must have these protections as a defensive mechanism because Verizon "**has** been inclined to . put financial pressure on Cavalier by simply refusing to pay certain bills and using that refusal as leverage against Cavalier in other arenas." *Cavalier PFR* at 6 (emphasis in original) Cavalier cites nothing to support this assertion of abusive "tactics" on Verizon's part, nor could it. The only relevant evidence in the record proves Cavalier's unsupported claim to be wrong

The record shows that Verizon stopped paying its bills to Cavalier on only one occasion - as a last resort when Cavalier refused to pay *any* of its bills, including amounts that were undisputed *Hearing Tr* at 313. The record further shows that this billing dispute was resolved in Verizon's favor, with Cavalier making "multimillion dollar payments that were due Verizon [and] had not previously been paid " *Hearing Tr* at 316 (Smith). Because there is no support for Cavalier's claims of past abuses, there is no basis for approving Cavalier's belated request for assurance of payment protections against such abuses (if the Bureau is inclined to consider the merits of Cavalier's request at all, despite its procedural impropriety).

Just as there are no facts supporting Cavalier's mutual assurance of payment proposal, there is no policy rationale for it. Verizon and Cavalier are not similarly situated, so there is no reason to accord Cavalier the same assurance of payment provisions that run to Verizon. Verizon is legally required to grant its competitors access to its network in a number of specific ways, as set forth in the Act and the Commission's implementing rules Cavalier however, is not subject to this same, extensive collection of obligations that compel Verizon to allow Cavalier to use Verizon's network in particular ways, at prescribed prices. As such, Cavalier is able to retain much more control over its business risks, and needs much less protection from defaults than Verizon does. In addition, Verizon provides a very high volume of services to Cavalier, but Cavalier provides relatively little service to Verizon Indeed, as Cavalier conceded at the hearing, Cavalier owes Verizon about $18 million more per year than Verizon owes Cavalier *Hearing Tr* at 320-21. The substantially greater volume and value of the services Verizon provides to Cavalier justifies a greater level of protection to secure payment for those services

Finally, Cavalier urges the Bureau to impose a mutual assurance of payment provision that is consistent with the Commission's *Policy Statement* That request makes no sense because the *Policy Statement* focuses exclusively on providing "general guidance to *incumbent local exchange carriers* (LECs) seeking to revise the deposit and payment provisions of their interstate access tariffs " *Policy Statement* ¶ 1 It provides no basis for extending the assurance of payment provision the Bureau adopted to Cavalier.

The Bureau should reject out of hand Cavalier's request for an assurance of payment provision because Cavalier failed to properly identify this issue for resolution in accordance with the requirements of the Act and the Bureau itself If the Bureau is inclined to consider the merits of Cavalier's new issue, even though it was not properly presented, the Bureau should

nevertheless reject Cavalier's mutual assurance of payment proposal because there are no facts or sound policy rationale to support it

IV. THE BUREAU SHOULD NOT EXCLUDE "VIOLATIONS OF THE COMMUNICATIONS ACT" FROM THE AGREEMENT'S LIMITATION OF LIABILITY PROVISION (ISSUE C25)

Cavalier asks the Bureau to reconsider its ruling on Issue C25 and to exclude claimed violations of the Communications Act from the Agreement's limitation of liability provisions *Cavalier PFR* at 7 Although Cavalier calls its reconsideration request "limited," its position on reconsideration is not materially different from its original proposal in this proceeding Cavalier's continuing objection to any limitation of liability for alleged violations of the Communications Act would allow it to seek unlimited damages for virtually any service failure, because any service failure is arguably a violation of the Communications Act [2]

Cavalier makes no attempt to dispute the Bureau's finding that Cavalier's proposed exception "is commercially unreasonable and would eviscerate any limitations on liability Cavalier agrees to elsewhere in the agreement." *Order* ¶ 183. Cavalier also ignores the Bureau's recognition that the Commission previously held that the Virginia SCC's performance assurance plan ("PAP") "is an appropriate means for ensuring performance and providing financial remedies related to Verizon's obligations under the Act " *Id* Cavalier instead relies on two other Commission decisions to try to support its claim that the Bureau's ruling on Issue C25 is inconsistent with the Act. But nothing in these decisions or the Act itself justifies reconsideration of the Bureau's ruling on this issue

[2] *Romano Direct* at 1-3 Cavalier only concedes that Verizon is entitled to limit its liability for "the Virginia laws governing communications, including but not limited to applicable provisions of Titles 12 1 and 56 of the Virginia Code" and "any unstayed regulations or decisions of a regulatory body or court of competent jurisdiction interpreting or implementing those laws " *See Parties' Final Proposed Contract Language*, filed October 29, 2003, at 36

Cavalier asserts that the *CoreComm* cases[3] support a finding that Cavalier is entitled to claim unlimited damages for violations of the Communications Act. There is no basis for Cavalier's novel interpretation of the *CoreComm* cases In those cases, the Commission concluded that, under some circumstances, it has concurrent jurisdiction over actions alleging violation of the terms of interconnection agreements.[4] In *Core Comm v Verizon*, the Commission concluded that specific action by Verizon violated section 251 of the Act In neither case does the Commission mention limitation of liability or the appropriate scope of any limitation of liability provision. Therefore, the cases do not hold that a carrier like Cavalier has the right to an interconnection contract provision allowing unlimited recovery of damages for violations of the Communications Act Nothing in those cases or the Act requires the Bureau to reconsider its finding that it is commercially unreasonable to include in the Agreement an exclusion that would gut the general liability limitations Cavalier agreed to elsewhere in the contract It is customary and appropriate for telecommunications carriers to reasonably limit their liability to avoid the potentially unlimited recovery that could occur by allowing consequential damages,[5] and nothing in the Act compels the Bureau to disapprove this well-accepted practice.

Moreover, the language the Bureau adopted does not "***deprive*** Cavalier of a damages remedy," as Cavalier claims. *Cavalier PFR* at 9 (emphasis in original). Cavalier can still seek

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[3] *Core Comm , Inc and Z-Tel Comm , Inc v SBC Comm Inc et al* , 18 FCC Rcd 7568 (2003), *Core Comm , Inc v Verizon Maryland Inc* , 18 FCC Rcd 7962 (2003) ("*CoreComm* cases")

[4] As Verizon has noted elsewhere, it respectfully submits that the Commission's ruling on this point were in error, and it reserves its right to challenge the Commission's decision that it possesses such jurisdiction.

[5] *In the Matter of AT&T*, 76 F.C C 2d 195 at ¶ 9 (1980); *citing Western Union Telegraph Co v Priester*, 276 U S 252 (1928), *Western Union Telegraph Co v Esteve Bros & Co* , 256 U.S. 566 (1921), *Holman v Southwestern Bell Telephone Co* , 358 F Supp 727 (D Kan 1973), *American Tel & Tel Co v Florida-Texas Freight Co* , 357 F Supp 977 (S D Fla), aff'd per curiam, 485 F 2d 1390 (5th Cir 1973), *Wheeler Stucky, Inc v Southwestern Bell Telephone Co* , 279 F Supp 712 (W D Okla 1967), *Waters v Pacific Telephone Co* , 12 Cal 3d 1, 114 Cal Rptr 753, 523 P 2d 1161 (1974), *Cole v Pacific Tel & Tel Co* , 112 Cal App 2d 416, 246 P 2d 686 (1952), *Southern Bell Tel & Tel Co v Invenchek, Inc* , 130 Ga App 798, 204 S E 2d 457 (1974), *Wilkinson v New England Tel & Tel Co* , 327 Mass 132, 97 N.E 2d 413 (1951), *Weld v Postal Telegraph Cable Co* , 199 N Y 88, 92 N E 415 (1910)

direct damages related to alleged violations of the Communications Act; it just cannot recover unlimited, indirect, consequential damages As Verizon witness Romano testified, with respect to breaches for services failures, Section 25.3 limits the breaching party's liability to the cost of that service. *Hearing Tr* at 576 (Romano) With respect to breaches other than service failures, Section 25 3 limits a breaching party's liability to direct damages and excludes liability for indirect and consequential damages. *Hearing Tr* at 576-577 (Romano)

Because Cavalier has no legal entitlement to seek recovery of unlimited damages for violations of the Communications Act, and because it has not disputed the Bureau's conclusion that Cavalier's proposal is unreasonable as a policy matter, the Bureau should deny Cavalier's petition for reconsideration of the ruling on Issue C25.

V. THE BUREAU SHOULD REJECT CAVALIER'S REQUEST TO REQUIRE VERIZON TO COMPENSATE CAVALIER FOR DISPATCHING ITS TECHNICIANS (ISSUE C27)

Cavalier wants Verizon to pay Cavalier when it dispatches technicians because of a purported problem in a Verizon-provided loop *Cavalier PFR* at 10. The *Order*, however, adopts a "more sensible"[6] solution to require the parties "to participate in additional up-front testing at no charge to Cavalier,"[7] which ensures that Verizon will correct provisioning errors *before* Cavalier dispatches a technician Cavalier does not oppose this enhanced testing approach, but continues to advocate, *in addition*, payments from Verizon for Cavalier truck rolls in response to any report of a problem with a new loop installation. The Bureau should reject Cavalier's request for such duplicative measures

Cavalier complains that the *Order's* solution is inadequate because it will not reduce Verizon's error rate to zero, so Verizon should still have to pay Cavalier for any truck rolls it

[6] *Order* ¶ 195
[7] *Order* ¶ 195

claims Verizon causes. *Cavalier PFR* at 10 Cavalier's argument is unavailing, because it assumes that Verizon has a legal obligation to provide perfect service to competitive LECs, such that Verizon should compensate Cavalier when it does not meet this standard of perfection. But Verizon has no obligation to provide perfect service to either its retail or wholesale customers *See, e g , Virginia Arbitration Order* ¶ 709

Moreover, it is not true, as Cavalier claims, that Verizon will "escape responsibility" for imposing costs on Cavalier when Cavalier dispatches a technician to isolate a loop problem *Cavalier PFR* at 10. Verizon is already subject to performance standards in Virginia that carry substantial monetary penalties for nonperformance As the *Order* recognizes, the "Virginia Commission's [Performance Assurance Plan] is an appropriate means for ensuring performance and providing financial remedies related to Verizon's obligations under the Act."[8] Section 26 01 of the parties' interconnection agreement specifically incorporates Verizon's responsibilities under the Virginia PAP In fact, the Virginia PAP includes several metrics that cover the very provisioning errors that Cavalier complains of here.[9]

The *Order* rightly focuses on a practical solution to ensure that, once Verizon has completed a service installation, Cavalier has the opportunity to confirm with Verizon that the service is working *before* Cavalier dispatches one of its own technicians. Through Cooperative Testing, when Verizon completes a service installation, the Verizon technician calls the number provided by Cavalier on its order form and works with Cavalier in real time to confirm that the service is working. *Albert Panel Rebuttal* at 21-22 If the service is not working, Verizon will work with Cavalier to resolve the problem *at no charge to Cavalier. Id.* As the Bureau

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[8] *Order* ¶ 183, *citing Verizon Virginia Section 271 Order* ¶ 198, *Virginia Arbitration Order* ¶¶ 17-18, *Agro Rebuttal* at 3

[9] *See Agro Surrebuttal* at 1-2 (describing PR-6-01-3112 (Percent Installation Troubles Reported Within 30 Days – POTS Loop-UNE), which captures troubles reported on newly installed loops that Cavalier reports as not working)

recognized, this solution meets Cavalier's legitimate concerns. *Order* ¶ 195.

Cavalier also contends that reconsideration is justified because Verizon "misrepresented" its position on retroactive charges for truck rolls. Cavalier's accusation is untrue and, in any event, irrelevant Cavalier, relying on some bills attached to a December 11, 2003, letter to the Bureau, claims that Verizon bills retroactively for certain dispatch charges in Virginia, even though Verizon said it did not do so in its reply brief *Cavalier PFR* at 10. But the bills themselves prove Cavalier is wrong.

The retroactive billing issue discussed at pages 69-70 of Verizon's Reply Brief concerns "installation" dispatch charges only These charges apply when Verizon installs an unbundled loop for the competitive LEC customer, the competitive LEC reports that the loop does not work, and Verizon dispatches a technician who discovers that there is no trouble with Verizon's facilities Based on Verizon's September 9, 2003 industry letter, Cavalier Exhibit AW-5, staff asked Verizon to state in its brief whether Verizon was going to bill Cavalier retroactively for such installation dispatch charges. The answer was (and is) no. As Verizon explained in its Reply Brief, it had been accurately billing the installation dispatch charges approved in Virginia, and therefore there was no need to bill for past amounts *Verizon Reply Brief* at 70 In fact, Cavalier has been timely billed for these charges

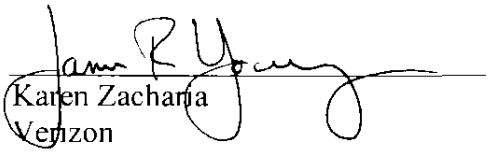
Cavalier's December 11 letter claims that, on December 10, Verizon nevertheless billed Cavalier retroactively for installation dispatch charges, but that is not so. The bills attached to that letter are not for *installation* dispatch charges; they are for *maintenance* service dispatch charges – an entirely separate category of charges. Although Cavalier challenged Verizon's installation dispatch charges, Cavalier did not challenge maintenance service charges in its testimony or at the hearing, and these charges are not mentioned in Exhibit AW-5, which, as

noted above, was an industry letter solely about installation dispatch charges.

In any event, Cavalier's attempt to cast doubt on Verizon's testimony about how it handled retroactive dispatch charges is irrelevant to whether the Bureau made a well reasoned ruling on Issue C27 The Bureau's objective in resolving this issue was to achieve a practical, long-term solution to improving loop installation performance The additional testing the Bureau ordered will best meet this objective Approving Cavalier's proposal to *also* allow Cavalier to charge for truck rolls would undermine the efficient solution the Bureau ordered and remove the incentive for Cavalier to fully commit to Cooperative Testing. The Bureau should thus reject Cavalier's petition for reconsideration on this point.

DATED: January 22, 2004.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that on the 22nd day of January, 2004, the Opposition of Verizon Virginia Inc in the above-captioned proceeding was served on the following parties:

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